

**March 1, 1999**

**P.S. Protest No. 98-28**

## **FOUR STAR AVIATION, INC.**

**Solicitation ASYS-99-R-01**

### **DIGEST**

Protest of award of air transportation contracts is sustained in part. Initial protest to contracting officer was timely, but issues raised subsequent to initial protest were not. Award of more than one indefinite delivery contract to commonly controlled entities was improper because, under scheme of contracts, doing so prejudiced the Postal Service and other offerors.

### **DECISION**

Four Star Aviation, Inc., protests the award of air transportation contracts to Tol Air Services, Inc. (Tol Air), and MBD Corporation (MBD) under solicitation ASYS-99-R-01.

Solicitation ASYS-99-R-01 for carriers with average line haul lengths under 500 miles (which the solicitation calls Regional Air Carriers) was issued by National Mail Transportation Purchasing, Postal Service Headquarters, on July 17, 1998. Section A of the solicitation provided, in part, as follows:

The purpose of this solicitation is to procure air transportation of mail on any flight on the supplier's air transportation system. . . . [T]he supplier's air transportation system is determined . . . by the schedules published . . . in the Official Airline Guide [OAG] plus . . . any unpublished schedules which the supplier provides to the OAG for exclusive distribution to the Postal Service.

The Postal Service intends to award more than one contract under this solicitation. Once contracts are awarded, carriers are required to transport all loose sack mail and containers tendered by the Postal Service under . . . H.33, [Purchasing Manual (PM)] Clause 2-42 Indefinite Quantity (January 1997), for a given flight . . . .

Section B.3, Assignment of Mail, discussed the assignment of mail to carriers in terms of various factors, including carrier performance (B.3.b.), flight types (non-stop, multi-stop, transfer, etc.) (B.3.c.), other operational needs (including availability of mail and earliest mail delivery time consistent with the arrival profile (B.3.d.), and “Equitable Distribution,” the “fair and reasonable, but not necessarily equal division of mail between suppliers offering flights which are equivalent . . . .” (B.3.e.).

Section C.1 contemplated a contract term beginning just after midnight, September 12, 1998, and continuing through September 8, 2000.

Section F.1 of the solicitation set the fixed rate to be paid for service under the solicitation, expressed as a rate per pound per mile. A rate per pound for terminal handling<sup>1</sup> was to be established by each offeror. Section F.2 provided a minimum guarantee per contract of \$500.

Solicitation provision J.2 stated, in part: “Offerors may submit only one proposal.” Provision K.8 provided (as amended): “The Postal Service will award a contract resulting from this solicitation to all capable offerors whose proposal [sic] conforms to the solicitation, and who is [sic] eligible.” Section M, Evaluation and Award Factors, as amended, provided as follows:

General: Any offeror providing the above information and having been determined capable by the Contracting Officer will be award contract ASYS R-99-01. For purposes of this contract, capable means that the supplier is an airline according to the criteria listed below, and is not listed on the Postal Service list of debarred, suspended, and ineligible suppliers, and is otherwise qualified and eligible to receive an award under applicable laws and regulations.

- a. FAA Operating Certificate/Eligibility: In order to be eligible for contract award, an offeror must be able to demonstrate that it is an air carrier as defined in the Federal Aviation Act, whose primary business is direct air transportation and that it is engaged in that business on a day-to-day basis, and has been operating service for a minimum of 90 days prior to contract award.

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<sup>1</sup> G.1. ww. defines terminal handling: “All ground handling of mail between pick-up at the designated tender point at origin and delivery at the designated delivery point at destination. . . . [It] includes loading and unloading of mail onto and off of aircraft, loading and unloading of loose sack mail into and out of airline transport equipment, drayage to and from aircraft and AMC/AMF, staging of mail, and where interline transfer are required . . . delivery to the down-line connecting carrier. . . .

- (1) The offeror must provide a copy of a valid Federal Aviation Administration operating certificate issued [under] either Part 121 or Part 135 of Title 14 of the Code of Federal Regulations.
  - (2) The offeror may be required to submit a copy of the operating specifications, if requested by the Contracting Officer.
- b. Award may be postponed until the offeror provided the Contracting Officer with the assigned OAG code.

Offers were received from and awards were made to 31 offerors including, *inter alia*, Four Star Aviation, Inc., dba Four Star Air Cargo, One Air Cargo Center, C E King Airport, St. Thomas, VI, terminal handling rate \$0.41; Tol Air Services, Inc. PO Box 27570, Airport Station, San Juan, PR, terminal handling rate \$.39;<sup>2</sup> and MBD Corp, PO Box 37840, Airport Station, San Juan, PR, terminal handling rate \$.33.<sup>3</sup> Awards were made beginning September 2 (when the Four Star, MBD, and Tol Air awards occurred) and continuing until September 11.

Letters dated September 11 from the contracting officer advised offerors of all of the awards. Four Star's proprietor stated that he inquired about the status of awards to a postal representative in Puerto Rico between September 14 and 17, and the representative said he would check and get back to Four Star. Four Star first learned on September 22 that "the second and third flights of the day into St. Thomas" would be given to MBD starting September 26. On Sunday, September 27, Four Star's proprietor first saw and read the September 11 letter advising of all the awards which he believes arrived on September 26.

By letter dated and transmitted by facsimile on September 28, Four Star's president protested the awards to Tol Air and MBD to the contracting officer. The letter noted the common ownership of Tol Air and MBD, the solicitation provision allowing "each entity to supply one bid," and a previous situation in which three commonly-controlled carriers

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<sup>2</sup> Tol, whose offer was signed by Jorge A. Toledo, President, completed provision L-1, Type of Business Organization, to indicate that it "[o]perates as "a corporation incorporated under the laws of the state of San Juan, P.r.; [sic]," and as "a partnership." It provided air carrier certificate IMYA059F in the name of TOL-AIR SERVICES, INC., effective date: May 17, 1983, reissued: March 9, 1989, and indicated lift for aircraft types CVR (Convair) and Cessna 402.

<sup>3</sup> MBD, whose offer was signed by Paul Preston, Treasurer, completed provision L-1 to indicate that it "[o]perates as "a corporation incorporated under the laws of the state of P.R.;" and as "a joint venture." It stated it was controlled by a parent company, Tol Air Services, Inc., and that its TIN was the same as that which Tol Air had provided. In the course of the protest, MBD asserted that it has a TIN separate from Tol Air's. MBD provided air carrier certificate FIUA908D in the name of MBD CORP., effective date: September 10, 1981, reissued: April 4, 1989, and indicated lift for aircraft types D3F (Douglas DC-3) and BE-18 (Beechcraft).

provided “low, middle, and high” bids and “activat[ed] the company that would be lower than Four Star . . . .”<sup>4</sup> Contending that this presented a similar situation, the letter requested the disqualification of both firms “for having acted in an improper and illegal manner with respect to the requirements of the solicitation.”

By letter dated and transmitted on October 6, Four Star’s counsel protested those awards to this office. That latter protest contends that both awards are improper because the two firms, commonly controlled, constitute only one offeror for the purposes of the solicitation, or that if separate offerors, their offers “were the result of a combination or conspiracy in restraint of trade . . . to submit offers designed to capture the mail transportation market between San Juan and St. Thomas . . . .” and in violation of the solicitation’s Certificate of Independent Price Determination.

The protest describes a “multiple corporation play” in the San Juan – St. Thomas market, as follows:

Mail transportation between Puerto Rico and the Virgin Islands operates different than transportation over toured in the United States. Loads average 3,500 pounds per flight and, therefore, DC-3 aircraft are generally used. These aircraft carry only USPS mail and do not operate if there is no mail on a particular day.

The multiple corporation play works in the following manner. First, one corporation submits an offer that it knows will be lower than Four Star’s. The second corporation then submits an offer which it believes will be higher than Four Star’s. . . .

Secondly, the corporations know that the low bidding corporation will be tendered the mail. The corporations further know that, because Four Star’s flight was dedicated solely to the mail, Four Star will no longer operated flights over the route and, presumably, will turn its attention to other markets. As soon as that happens the low bidding corporation will simply stop publishing its flight schedule and the high bidding corporation will be left and the only corporation on the route.

The protest also questions whether either Tol Air or MBD exist as “validly constituted corporations,” whether MBD has an OAG identifier, and whether either carrier “has a ‘system’ that qualified them to submit offers . . . .” It also contends that “both MBD and

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<sup>4</sup> In 1994, Four Star protested to this office awards to three commonly controlled carriers on essentially similar grounds. Our file on that protest was closed without a decision after Four Star filed a lawsuit involving the same matter.

Tol Air aircraft use the same flight numbers,” and that neither entity has published OAG schedules or has provided unpublished schedules to the Postal Service.

Subsequent submissions by Four Star’s counsel have expanded and elaborated on the some of the bases for counsel’s protest. The submissions include evidence of the entities’ common ownership and control, the decertification of MBD as a corporation in July, 1997, and the ownership of the aircraft used by MBD by Tol or other Tol-related entities, not MBD.

The contracting officer questions the timeliness of the initial protest, citing the second part of PM 3.6.4.d., that “no protest other than one by a [debriefed] protester . . . will be considered if received more than 15 days after award of the contract in question.” The contracting officer recognizes, however, that our decisions have established that “when the contracting officer, in violation of the regulatory provisions governing notice of award, makes the filing of a timely protest impossible, the running of the timeliness period is tolled until the protester knows or should have known of the award.” *American Telephone Distributors, Inc.*, P.S. Protest No. 87-117, February 23, 1988. The contracting officer suggests that the exception should not apply in an instance involving multiple awards made over time. Further, with respect to timeliness, the contracting officer contends that the additional issues presented in Four Star’s counsel’s protest are not timely to the extent that it raises issues not contained in the initial protest.

According to the contracting officer, Tol Air and MBD could submit separate offers since they had “separate and individual air carrier certificates in their respective names” particularly since “coordination of operations is common” in the air industry, for example, as in the case of Continental (an ASYS contractor) and Continental Express (a regional ASYS contractor). The contracting officer concludes that since MBD’s offer disclosed Tol Air as its parent, “it is reasonable to expect operational cooperation.”

Further, in the contracting officer’s view, a capable airline may fly “only intermittently . . . on demand,” and he cites information from postal personnel in San Juan that both offerors have been flying “over 18 years.”

The contracting officer asserts that to the extent that the protest “suggest[s] a need to . . . determine whether [this contract format] is the best purchasing method [in this geographic area],” to do so “would take substantial time and should have no effect on the protest outcome.” Further, such a contention involves a matter inherent in the solicitation that should have been the subject of a protest against the solicitation terms.

The contracting officer also contends that the contention that the two offerors cannot be compliant with their certificates of independent price determination is unsupported speculation in the absence of evidence of collusive behavior.

The protester responded to the contracting officer’s statement, contending that the two entities have “no separate legal existence” or are, if separate, so closely related as to

comprise only one offeror. Further, the protester contends neither offeror was operating service for 90 days prior to contract award, as shown by their "initial submissions" of August 5, 1998, to the OAG for an air carrier code. The protester contends that Tol Air and MBD cannot be code-sharing as the contracting officer suggests because the flights are not reported to the OAG as code sharing, and that the carriage of mail tendered to MBD on Tol Air aircraft violates either the provision of the solicitation which precludes the carriage of mail on code-sharing flights or the solicitation's prohibition on subcontracting line-haul service without the Postal Service's approval.

Counsel for Tol Air and MBD provided comments on the contracting officer's statement which concurred in the contracting officer's assertion that the protest was untimely in its entirety and also contending that Four Star lacked standing to protest because its direct economic interest was not affected by the multiple awards. Counsel's submissions also provided information about the status of the entities, acknowledging that MBD's certificate of incorporation had been cancelled by the Puerto Rico Department of State in July, 1997, a fact which went unnoticed by MBD's management until July, 1998, and that MBD had again become Puerto Rican corporation in good standing as of August 31, 1998, prior to the contract award. An affidavit by the entities' common owner recited the transfer of aircraft from Tol to MBD on September 3, 1998, so that MBD was, in fact, operating its own aircraft under the contract, and explaining the difference between the terminal handling costs of the MBD and Tol Air offers as relating to the different cargo capacities of MBD's DC-3 aircraft and Tol Air's Cessnas.

## DISCUSSION

The contention that the initial protest is untimely is without merit. In an earlier protest, *Flamenco Airways, Inc.*, P.S. Protest No. 91-21, May 21, 1991, we applied the *American Telephone* rule with respect to multiple awards of a regional air transportation contract, holding that the fact that the protester knew of its award did not require it to inquire of the awards to others when the offeror "has a justifiable basis for relying on the contracting officer giving notice of award pursuant to postal procurement regulations." A similar conclusion applies here.<sup>5</sup>

However, to the extent that the several submissions of protester's counsel subsequent to the initial protest raise additional issues not comprehended by the initial protest, those issues are untimely and not for our review. The timeliness of newly raised

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<sup>5</sup> Awardee's counsel suggests that *Amerijet International, Inc.*, P.S. Protest No. 87-45, September 2, 1987, requires a different result. In that case, however, the protest was untimely because the protester separately knew of the basis of its protest before it received the notice of award. Here, on the contrary, Four Star did not, since there is no evidence that it knew of the award to Tol Air before its receipt of the notice of the awards.

grounds for protest is measured from the date they are presented; they do not “relate back” to the initial protest. *Cordant, Inc.*, P.S. Protest No. 94-08, June 23, 1994.<sup>6</sup>

Awardees’ counsel’s contention that the protester lacks economic standing to challenge the awards is without merit. Under the solicitation scheme, Four Star is clearly affected by the awards to Tol Air and MBD, since those awards directly affect its entitlement to receive work under the contract’s equitable distribution policy. No more is required.

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<sup>6</sup> The principal additional issue, the correctness of the offerors’ certificates of independent price determination involves the matter of the offerors’ capability (formerly referred to as responsibility, see *RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999). An affirmative determination of capability is ordinarily not for our review absent evidence of fraud or bad faith on the part of the contracting officer or a failure to apply definitive capability criteria. See, e.g., *Automated Conversion Technologies, Inc.*, P.S. Protest No. 92-63, September 25, 1992 (involving determination of responsibility), see also *David I. Abse*, 51 Comp. Gen. 403 (1972):

Concerning your contention [about the] certification of independent price determination . . . it is our opinion that the certification of [the affiliated bidders] should be regarded only as indicating that the prices quoted by them were not discussed with or communicated to any competitor of the two firms or to any prospective bidder other than themselves, and that no attempt had been made to induce any other person or firm to submit or not to submit an offer for the purpose of restricting competition. Thus, where separate bids have been submitted by affiliated concerns and where these bids were computed by one person or arrived at as the result of discussions between the two concerns, if such bids were submitted for apparently legitimate business reasons, it would be immaterial whether the prices which they quoted were discussed between them before submitting such separate bids. We do not believe that such discussions would constitute a reasonable basis for concluding that the concerns had entered into a conspiracy to eliminate competition from other companies.

The other late-raised contentions involve the eligibility of Tol Air and MBD under the solicitation’s terms. Those terms are definitive capability criteria, and our review would involve whether the contracting officer had before him information from which he reasonably could have determined the criteria were or were not met. *Flamenco Airways, Inc.*, *supra*. The evidence submitted by the contracting met the appropriate standard.

Finally, there is an issue whether award could properly be made to MBD, whose corporate status had lapsed when its offer was made, but was reinstated before contract award. *RAF Technology, supra*, involved the issue whether award could be made on the basis of an offer submitted on behalf of a new corporate entity whose incorporation became effective subsequent to the submission of offers but before award. While the decision noted that award would not have been appropriate in a sealed bid (formally advertised) purchase because such an entity would not have been bound by its bid to perform the work, “negotiated procurements such as the one at issue here involve a different issue; whether there has been an attempted transfer or assignment of a proposal other than as allowed by law since the firm bid rule does not apply, and an offeror can withdraw its offer at any time,” concluding that there was “no question of attempted transfer or assignment.” (Citation and internal quotation omitted.)

Here, MBD was incorporated at the time of award. Its previous lapse of corporate status does not invalidate its award.

Whether the submission of offers by related entities is permissible is governed not only by the terms of the solicitation, but also by the requirement that such action not be “prejudicial to the interest of [the Postal Service] or the other [offerors].” *Fred Austin Trucking, Inc.*, P.S. Protest No. 86-66, December 10, 1986, *citing Pioneer Recovery Systems, Inc.*, Comp. Gen. Dec. B-214878, November 13, 1984, 84-2 CPD ¶ 520. That decision, in turn, cited *Atlantic Richfield Company*, 61 Comp. Gen. 121 (1981), “in which the GAO concluded that affiliates’ multiple bids were prejudicial in a solicitation for the sale of natural gas in a situation in which there were tie bids and a choice would be made among tie bids by lot. The decision notes that in that case ‘the unfair advantage [to the affiliated bidders] . . . was the lack of true price competition and the increased mathematical probability of bidders’ receiving an award by lottery.’”<sup>7</sup>

Similarly, *District Moving & Storage, Inc., et alia.*, Comp. Gen. Dec. B-272070, August 9, 1996, 96-2 CPD ¶ 60, upheld the terms of the State Department’s solicitation for household goods storage and related services which contemplated multiple awards but restricted award to only one of any affiliated offerors, applying the “prejudice to the Government” standard. The GAO concluded that allowing multiple awards to affiliated companies would prejudice the State Department for several reasons, including “plac-

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<sup>7</sup> *Atlantic Richfield* is one of a number of cases that follow from 39 Comp. Gen. 892 (1960):

[T]his Office has not adhered to the proposition that all double bidding is prohibited or even undesirable. . . . It is not unusual for bids to be received from different divisions of the same corporation and sometimes from a parent corporation and one or more of its subsidiaries under the same invitation for bids. In such cases the bidders generally are responding to separate copies of the invitation sent to them and apparently do not have any reason to believe that an affiliated company or division has been requested to submit a bid. We perceive no legal objection to consideration of the bids received under these circumstances. An individual might also have legitimate reasons for submitting bids on behalf of two or more of the companies which he owns or controls. . . .

Of course, a contracting officer would be justified in rejecting more than one bid submitted by a person, or by two or more affiliated companies, where such bidding was resorted to for the purpose of circumventing the requirements of a statute . . . ; where an unfair advantage may be gained in cases of an award through the drawing of lots; or in any other instance where multiple bidding is prejudicial either to the United States or to other bidders. [Internal quotations omitted.]

Most of the other cases following that decision have upheld the consideration of multiple bids or offers. See, e.g., *David I. Abse, supra* (problem with mechanical subcontractor’s quotes legitimate business reason for multiple construction bids); 52 Comp. Gen. 886 (1973) (uncertainty concerning pending sale of subsidiary is legitimate business reason); *Pioneer Recovery Systems, Inc., supra*; (where protester had opportunity to submit lowest bid, no prejudice from submission of bids by affiliated concerns); *Robbins-Gioia, Inc.*, Comp. Gen. Dec. B-274318, December 4, 1996, 96-2 Comp. Gen. Dec. ¶ 222 (consideration of independently prepared offers of subsidiary and affiliate of common parent which were separate business entities afforded those offerors no unfair advantage and did not prejudice the government or the protester).



ing the agency at a disadvantage when managing the contract[s]” since an affiliate placed in a non-use status for violating its contract would have little incentive to correct its violations if the work went to an affiliate, and affiliates “could “game” their offers “by a lower-priced affiliate declining business “knowing it would go to the higher-priced affiliated awardee.”<sup>8</sup>

While the solicitation’s provision precluding multiple offers from a single offeror does not, by its terms, preclude separate offers from affiliated offerors (*Robbins-Gioia, Inc., supra*), in view of the scheme of the solicitation and its resultant contracts, the issuance of multiple awards to affiliated offerors competing in the same market prejudices the Postal Service and the other offerors/awardees for reasons similar to those recognized in *District Storage*. The solicitation contemplates multiple indefinite quantity contracts under which work (that is, mail to be transported) will be equitably distributed.<sup>9</sup> Accordingly, commonly controlled awardees in a single market can “game” the receipt of that mail by coordinating their offerings of flight schedules to assure that an intended common awardee is in line to receive the desired mail or to assure that between them all the common awardees receive a disproportionate share of the mail to be divided.<sup>10</sup>

The identified prejudice does not require the termination of all of the contracts awarded to the commonly controlled entities; it will be sufficient to terminate the contracts to the higher-priced common entities. Should doing so unduly limit available capacity in the

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<sup>8</sup> In reaching its conclusion, the GAO noted that the fact that it had declined to overturn multiple awards in a previous protest of a similar solicitation not including such a prohibition (*Colonial Storage Company, Paxton Van Lines, Inc.*, Comp. Gen. Dec. B-253501.5, October 18, 1993, 93-2 CPD ¶ 234) did not preclude the result where the State Department had supported the previous awards and no prejudice had been shown, since “each solicitation stands on its own.”

<sup>9</sup> Although the solicitation contemplates the possibility of differing prices for the terminal handling portion of individual contractor’s awards, nothing in the solicitation provides for the consideration of price in the distribution of mail to awardees. The contracting officer’s statement, however, appears to acknowledge the role of price in the distribution of mail, and MBD’s price was a factor in its receipt of the afternoon service which Four Star had previously provided. While Tol Air and MBD assert the existence of proper business reasons for the division of their enterprises, they do not explain them at length, and, in the one area in which they offer an explanation, it appears inconsistent with their offers’ terms. MBD’s lower terminal handling costs cannot be completely accounted for by the larger capacity of its aircraft compared to Tol Air’s, because each offeror proposed large aircraft (DC-3, Convair) in addition to small (Beechcraft, Cessna).

<sup>10</sup> Thus, if, price is an issue in the distribution decision as noted above, under the protester’s “multiple corporation ploy” scenario the lowest-priced common awardee can receive the award in order to thwart the receipt of that mail by a higher-priced competitor; when that competitor tires, a coordinated schedule adjustment can cause the higher-priced common awardee to receive the distribution. When price is not an issue, the common awardees can coordinate their schedules to receive a larger share of the mail subject to distribution. That is, in a given market, commonly controlled entities A1 and A2, competing with competitor B, could receive two-thirds of the mail, rather than the half which a single entity A would receive.

affected market, additional capacity may be solicited as the solicitation allowed. Any new solicitation should, however, include appropriate provisions to preclude the reemergence of similar concerns.

The protest is sustained to the extent indicated.

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